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U.S. Department of Justice

Immigration and Naturalization Service

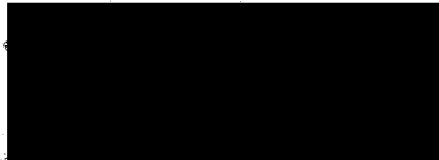
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OFFICE OF ADMINISTRATIVE APPEALS

425 Eye Street N.W.

ULLB, 3rd Floor

Washington, D.C. 20536



File: WAC 01 271 57336

Office: CALIFORNIA SERVICE CENTER

Date: **FEB 27 2003**

IN RE: Petitioner:
Beneficiary:



PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

IN BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. § 103.7.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based visa petition was denied by the Director, California Service Center. The matter is now before the Administrative Appeals Office. The appeal will be dismissed.

The petitioner is a corporation organized in the State of California in May 1996. It is engaged in the import and sale of lacquered miniature art boxes and the export of hunting and fishing gear. It seeks to employ the beneficiary as its president and marketing manager. Accordingly, it endeavors to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C), as a multinational manager. The director determined that the record did not demonstrate that the beneficiary's duties had been or would be primarily managerial or executive in nature for the petitioner.

Counsel for the petitioner submits a brief and asserts that the beneficiary primarily manages the petitioner's marketing function and also is the petitioner's president.

Section 203(b) of the Act states, in pertinent part:

(1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

* * *

(C) Certain Multinational Executives and Managers.
-- An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

The language of the statute is specific in limiting this provision to only those executives and managers who have previously worked for the firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and are coming to the United States to work for the same entity, or its affiliate or subsidiary.

A United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(1)(C) of the Act as a multinational executive or manager. No labor certification is required for this classification. The prospective employer in the United States must furnish a job offer in the form of a

statement that indicates that the alien is to be employed in the United States in a managerial or executive capacity. Such a statement must clearly describe the duties to be performed by the alien. 8 C.F.R. § 204.5(j)(5).

The issue in this proceeding is whether the beneficiary has been and will be employed in a managerial or executive capacity for the petitioner.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

The term "managerial capacity" means an assignment within an organization in which the employee primarily-

- i. manages the organization, or a department, subdivision, function, or component of the organization;

- ii. supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;

- iii. if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and

- iv. exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), provides:

The term "executive capacity" means an assignment within an organization in which the employee primarily-

- i. directs the management of the organization or a major component or function of the organization;

- ii. establishes the goals and policies of the organization, component, or function;

iii. exercises wide latitude in discretionary decision-making; and

iv. receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

The petitioner provided a copy of Form ETA 750 with the following description of the beneficiary's job position:

President - Responsible for the long and short term development of the Corporation, analyzing and setting financial goals and policies, hiring and firing staff, with sole responsibility to the Board of Directors.

Marketing Manager - Solely and completely responsible for all marketing endeavors of the Corporation, develops marketing strategies and ensures the execution of same through subordinates or independent contractors, develops a strategy of promoting the historic significance and collectible value of lacquer boxes, using media, public relations and website strategies, hiring and firing staff, and retaining of and dispensing with independent contractors' services in the execution of the function. Solely responsible to the Board of Directors in the execution of duties.

The director requested additional evidence including a more detailed description of the beneficiary's duties including the percentage of time spent in each of the listed duties. The director also requested the petitioner's organizational chart describing its managerial hierarchy and staffing levels and copies of the petitioner's California DE-6, Quarterly Wage Reports.

In response, the petitioner stated that the beneficiary spent 60 percent of his time as its marketing manager. The petitioner noted that its development had been "focused around its innovative marketing campaign to **introduce** Russian lacquered art boxes as a **collectible** to the USA market" (emphasis in original). The petitioner referred the director to its original description of the beneficiary's strategy and duties relating to his activities as a functional marketing manager. The petitioner indicated that the beneficiary re-designed its website to include history, cultural, and artistic information on lacquered art boxes as well as serving as an e-commerce portal. The petitioner indicated that the remaining portion of the beneficiary's time was spent on hiring/firing employees (2%), financial oversight (10%), technical oversight (15%), import/export oversight (8%), and operations oversight (5%).

The petitioner also provided its California Form DE-6 for the quarter ending September 30, 2001, the pertinent quarter. The

California Form DE-6 reflected six employees including the beneficiary. The petitioner provided job descriptions for four of the five employees subordinate to the beneficiary that were also found on the petitioner's California Form DE-6. The record does not contain a position description for the fifth employee found on the California DE-6. The office manager's duties included processing purchase orders, managing inventory, handling customer inquiries as well as being responsible for web page content. The officer manager's duties also included writing and editing descriptions, online and print-ad marketing and promotion, authoring an e-mail newsletter, and acting as account manager for exports to Russia. The artistic analyst/text editor's job duties included writing descriptions for inventory items, formatting text for the website, translating, answering calls, and researching history, genres, and time periods of inventory items. The graphic designer/typist/research assistant's duties included scanning and photographing lacquer art for the website and compiling information from reference sources. The part-time research specialist/artistic analyst's job duties included supervising text descriptions for the website, investigative research, and developing a Russian version of website pages.

The petitioner further provided a copy of its organizational chart depicting the beneficiary in the boxes designated president, technical department, marketing department, and financial department. The beneficiary was also depicted in several other boxes on the organizational chart under the marketing department including advertising/printing, customer relations/support/sales, translation services, and staff writers.

The director determined that the petitioner had not established that the beneficiary would be primarily engaged in executive duties rather than in performing menial tasks involved in importing and exporting. The director also determined that the beneficiary would not qualify as a manager as the beneficiary was primarily a first-line manager over non-professional and non-managerial employees. The director further determined that the beneficiary was not a functional manager as the petitioner had not clearly demonstrated that the beneficiary managed the function rather than performing the function.

On appeal, counsel for the petitioner asserts that the beneficiary manages the marketing department and that marketing of the corporation's product is an essential function within the corporation. Counsel also asserts that the beneficiary has the power to hire and fire employees and to retain or dismiss independent contractors and that even if the beneficiary is not managing employees, the beneficiary functions at a senior level within the organizational hierarchy. Counsel also states that based on a clear reading of the regulation one person can qualify as a functional manager without directly supervising other employees.

Counsel's assertions are not persuasive. The organizational chart submitted indicates that the beneficiary is directly involved in several operational positions of the petitioner. The positions include writing, translating, sales, customer relations, and advertising, duties that are more indicative of carrying out the operational tasks of the petitioner's business of selling lacquered boxes, whether through e-commerce, the media, or print advertising. The Service understands that the beneficiary developed the "strategy of promoting the historic significance and collectible value of lacquer boxes, using media, public relations and website strategies"; however, it appears that the beneficiary spends a significant portion of his time performing the essential functions of the created market strategy. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). A functional manager cannot be the individual performing the essential activities of the function, such as selling, writing and translating text for the website, advertising, and customer relations.

Counsel is correct that a person can qualify as a functional manager without directly supervising other employees. However, in this instance it appears the beneficiary is actually performing first-line supervisory duties over non-professional employees. The petitioner has not submitted sufficient information to demonstrate that the research, staff writer, or graphic design positions are professional positions rather than positions filled by individuals with specific knowledge regarding a specific product.

The petitioner's description of the beneficiary's duties is indicative of an individual contributing to the performance of the petitioner's essential function rather than managing the function. The beneficiary's duties listed on the organizational chart appear at odds with the petitioner's limited description of the beneficiary's duties. Managers plan, organize, direct, and control an organization's major functions and work through other employees to achieve the organization's goals. In the case at hand, the petitioner has provided evidence that it is the beneficiary who contributes to the performance of the major functions and work of the petitioner while also supervising the petitioner's non-professional employees.

Therefore, the record is not sufficient to establish that the beneficiary has been or will be employed in a managerial capacity either as a manager of other employees or of an essential function.

Counsel also recites the definition of "executive capacity" and asserts that the beneficiary qualifies under this definition as the president of the company. Counsel's assertion is not persuasive. Paraphrasing or reciting the definition of "executive

capacity" does not provide a complete position description for the beneficiary's position as president. See 8 C.F.R. § 204.5(j)(5). We note that the director has improperly speculated regarding the petitioner's type of business and its need for an executive without providing a foundation for this conclusion. However, we also noted that the record is deficient in conveying an understanding of what the beneficiary will be doing on a daily basis and how those daily duties are executive in nature. The record does not support counsel's assertion that the beneficiary as president is automatically an executive for immigration purposes. The Service is not compelled to deem the beneficiary to be an executive simply because the beneficiary possesses an executive title.

In sum, the petitioner has not established that the beneficiary has been employed in either a primarily managerial or executive capacity.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.